IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 487

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,

v.

THE MURRAY CORPORATION OF AMERICA
a Delaware Corporation, and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Motion to Dismiss or Affirm

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Appellee, The Murray Corporation of America, pursuant to Rule 16(1)(a) of the Revised Rules of the Supreme Court of the United States, moves that

(1) the appeal herein be dismissed on the ground that said appeal is not within the jurisdiction of the Court because not taken in conformity to 28 U.S.C., Section 1254(2),

or, in the alternative,

(2) the final judgment and decree of the Court of Appeals be affirmed, pursuant to Rule 16(1)(c), on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

STATEMENT OF THE CASE

This is a consolidated action originally brought by plaintiff-appellee, The Murray Corporation of America (hereinafter referred to as "Murray"), for a refund of personal property **ad valorem** taxes assessed by defendants-appellants, City of Detroit and County of Wayne as of January 1, 1952 upon personal property of the United States then in the possession of Murray under two letter subcontracts, under letter prime contracts between Kaiser Manufacturing Company and the United States and Curtiss-Wright Corporation and the United States, respectively, for the manufacture of parts and components for aircraft and aircraft engines for the United States Air Force for defense purposes.

Title to such personal property was vested in the United States on and prior to the assessment date by virtue of provisions of partial payment-title vesting clauses, incorporated in the letter subcontracts, which provided expressly that upon receipt by Murray of

> "partial payments . . . prior to delivery, on work in progress for the Government under this contract . . .
>
> (b) Upon the making of any partial payment under this contract, **title** to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, **shall forthwith vest in** the Government; and **title** to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid **shall vest in the Government forthwith** upon said acquisition or production . . ."[1].

[1]This is a standard and widely used partial payment clause contained in procurement contracts for defense work for the United States Government, which clause is permitted by Federal law and is provided for under applicable procurement regulations.

Partial payments were made to Murray under each of the aforementioned letter subcontracts prior to January 1, 1952, the assessment date, and thereupon title vested in the United States and remained vested in the United States on and after such date. Throughout, Murray contended that the property was owned by the United States and was immune from local ad valorem taxation and that the assessment and taxation of such property to Murray was illegal and void. After exhausting all administrative review Murray paid the taxes in question involuntarily and under written protest.

The cause was submitted to the District Court upon plaintiff-appellee's Motion for Summary Judgment and at the hearing of March 11, 1954—

> "it was **agreed** among the parties that **there was no genuine issue of any material fact,** and that a summary **judgment in favor of the plaintiff, or in favor of the defendants would be in order."**

See opinion of District Court, 132 Fed. Supp. 899, 900.

The tax here in question is an **ad valorem property tax** assessed pursuant to the Michigan General Property Tax Law and the Charter of the City of Detroit.

The City of Detroit personal property taxes here involved were assessed pursuant to Title VI, Chapter II, Section 1 of the Charter of the City of Detroit which provides:

> "Section 1 **All** real and **personal property** within the city **subject to taxation by the laws of this state shall be assessed** at its true cash value by the board of assessors herein provided . . . **All taxes upon personal property** may be assessed in any district, whether the person assessed is a resident of such district or not."

Both the City of Detroit and County of Wayne personal property tax assessments are made subject to the authority

of the General Property Tax Act of Michigan, 206 of the Public Acts of Mich. 1893, as amended (6 Mich. Stat. Anno. Sec. 7.1-7.243).

The tax is levied and assessed upon **property,** though collection may be enforced against the owner or, under certain circumstances, the person in possession. The tax is not a specific or privilege tax assessed against the taxpayer. *City of Detroit v. Phillip*, 313 Mich. 211; *Pingree v. Auditor General*, 120 Mich. 95, 102, 109.

If the title to and ownership of the property assessed was vested in the United States, the assessment is clearly void because such property owned by the United States is immune from taxation, even though in the possession of Murray. *United States v. Allegheny County*, 322 U.S. 174 (1944), *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886); see *Kern-Limerick, Inc. and United States v. Arkansas*, 347 U.S. 110, 123, and footnote 14; compare *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 at 499 (1953). This is also recognized by Michigan authorities. *Taylor v. County of Genesee*, 286 Mich. 674, 677-78 (1938); *Opinions of Michigan Attorney General*, January 17, 1936 and May 28, 1941.

On the other hand, if the partial payments clause was invalid under Federal law or if the title under the partial payments clause was only a bare lien or security title—as appellants contend—and ownership in fact remained in Murray on the tax assessment date, then under both Michigan and Federal law the property was not immune from taxation and the assessment was valid. That is the basic issue presented by this case.

The District Court and the Court of Appeals concluded as a matter of law that the partial payments clauses were author-

ized and valid under Federal law and that absolute title and ownership to the property in question was vested in the United States on tax assessment day.

I.

No Question is Presented Which Gives this Court Jurisdiction of the Appeal

Appellants predicate jurisdiction of this appeal upon Section 1254(2) of Title 28, U.S.C., which provides that this Court may review a judgment of the Court of Appeals

> "By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ."

The Court of Appeals did not decide that the Michigan General Property Tax Law or the Charter of the City of Detroit, pursuant to which the taxes in question were assessed, were "invalid as repugnant to the Constitution, treaties or laws of the United States," but held that under the partial payments clause in question the United States was vested with absolute title to the property in question and accordingly Murray had no interest in the property which could be subject to taxation. The validity of the ad valorem tax laws of the State of Michigan and of the City of Detroit have never been questioned in this litigation. The only real question has been whether title was vested in the United States or in Murray.

Appellants have never contended that property of the United States may be subjected to state ad valorem property taxes and the Michigan statute has never been construed as permitting the taxation of Federally owned property. Indeed, in his argument before the District Court counsel for the City of Detroit stated:

> "And I might say that it is not the position of the City that it has the right to tax the property of the United States Government. But we contend that we did not do that in this case."[2]

In their joint Reply Brief in the Court of Appeals appellants further stated that—

> "Neither the County nor the City has contended that these levies were specific taxes or that they were not **ad valorem** property taxes."

The District Court noted that—

> "There is no disagreement on the proposition that local government may not tax property owned by the Federal Government. Whether the personal property here assessed was owned by the Federal Government in the sense that it could not be taxed at a local level is the issue." 132 F. Supp. 899,904.

Appellants' statement (pages 5 and 6 of Jurisdictional Statement) that by determining that title to the personal property in question was vested in the Government the Court of Appeals caused "invalidation of state and local taxing statutes . . . as repugnant to the implied constitutional immunity of the United States," is a non sequitur. Admittedly the state and local taxing statutes imposing an ad valorem tax on property are valid. If title to the property was vested in the United State on tax assessment day, the property was constitutionally immune from such taxation. If title was not vested in the United States, there was no immunity.

The Court of Appeals merely applied Federal law to determine whether title to property produced for the sole ownership and use of the United States, in connection with the national defense, was in fact vested in the United States.

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[2]Transcript of proceedings before Honorable Thomas P. Thornton, District Judge, March 11, 1954; page 76.

United States v. Allegheny County 322 U.S. 174, 182; (1944), *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). Having so determined, the doctrine of Federal constitutional immunity undisputably obtains.

The authorities cited by appellants in support of this appeal (pages 3-4 of Jurisdictional Statement) merely reaffirm the rule that an appeal will lie only where a state statute is held invalid as repugnant to the Federal Constitution and do not support appellants' position here.

No question of the invalidity of a state statute as being repugnant to the Constitution, laws or treaties of the United States is here presented. We respectfully submit that this Court does not have jurisdiction of the appeal under 28 U.S.C. Section 1254 (2) and that the appeal should be dismissed.

II.

No Substantial Federal Question is Presented by the Appeal

Even if appeal under 28 U.S.C. Section 1254 (2) lies, we submit that the judgment of the Court of Appeals should be affirmed without further argument or filing of briefs because the questions have been authoritatively decided by this Court. The decision of the Court of Appeals is clearly correct and in complete accord with such prior decisions of this Court and every other court which has decided the question presented by this cause. There is no conflict of decision presented and no federal question which has not previously been decided by this Court or a Federal Court of Appeals.

The Partial Payment Clauses Vesting Title in the Federal Government Included in the Murray Subcontracts were Authorized, Effective and Valid.

Appellants' contention that the Air Force procurement

officers lacked authority to provide for the inclusion of partial payment clauses in the subcontracts here involved, transferring title to aircraft parts and components—manufactured by Murray for the United States—to the United States upon Murray's receipt of a partial payment upon the purchase price is contrary to express statutory provision and the decisions of the Court.

The subcontracts here involved and the prime contracts under which they were entered into were negotiated pursuant to authority contained in the Armed Services Procurement Act of 1947, 62 Stat. 23(a), (41 U.S.C. Section 151(c)) and regulations promulgated pursuant thereto. Congress expressly provided in Section 4(a) of this act that—

> "Except as provided in subsection (b)[3] of this section, contracts negotiated pursuant to Section 151(c) of this title may be of **any type** which in the opinion of the agency head will promote the best interests of the Government . . ."

Following the enactment of the Armed Forces Procurement Act of 1947, the Secretaries of the respective departments of defense (Army, Navy & Air Force) promulgated and issued joint regulations commonly referred to as the "Armed Services Procurement Regulations"[4], which regulations contained and authorized the specific partial payments clauses incorporated in the subcontracts here in question.

This very section of the Armed Service Procurement Act of 1947—Section 4a—was recently considered by this Court in *Kern-Limerick, Inc. and United States v. Scarlock, Commr.*

[3]Subsection (b) excludes cost plus a percentage-of-costs-type contracts which are not here involved.

[4]Armed Services Procurement Regulations (A.S.P.R.) 5-407-2(a), (1947 Supplement Code of Federal Regulations Title 10, Chapter VIII, Paragraph 805.407-2, Effective November 1, 1947, Printed in 12 F. R. 7693).

Rev. of Arkansas, 347 U.S. 110, 116 (1954) wherein it was held that Congress has granted wide discretion to the defense procurement agencies in determining the type of contract which would promote the best interests of the Government.

It has long been recognized that as an incident of the general right of sovereignty the United States may, within its Constitutional powers, through its various departments, enter into contracts which are not prohibited by law and are appropriate to the exercise of such powers (*Kern-Limerick and United States v. Scurlock, Commr. Rev. of Arkansas*, 347 U.S. 110, 116 (1954); *Muschany v. United States*, 324 U.S. 49,63 (1945); *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886); *United States v. Linn*, 15 Pet. 290, 315-316 (1841); *United States v. Tingey*, 5 Pet. 115, 127 (1831); *United States v. Hodson*, 10 Wall. 395 (1870); *Neilson v. Lagow*, 12 How. 98 (1851)) and like a private individual may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Heim v. McCall*, 239 U.S. 175 (1915); *Ellis v. United States*, 206 U.S. 246 (1907); *Atkin v. Kansas*, 191 U.S. 207 (1903).

Thus in the absence of prohibition procurement officers clearly have authority to include partial payment title vesting clauses in defense contracts. The inclusion of such provision is manifestly within and appropriate to the just exercise of powers granted to procurement officers by the Armed Services Procurement Act of 1947.[5]

[5] It is manifest that such provisions contained in 80% of Air Force procurement contracts were included to assure the Federal government of complete and absolute control and ownership of essential, basic and critical war material at all times—even during the process of manufacture and it was so stipulated by the parties (Stipulation No. 2, paragraph (1), Joint Appendix (85-86)). The clause was not for the mere purpose of avoiding state ad valorem taxes as now intimated by appellants (Jurisdictional Statement, page 5). However, even if this were the purpose of such clause, the power of Federal procurement officers to include such provision in the contract would not thereby be limited or barred. *Kern Limerick v. Scurlock* 347 U. S. 110,116 7.

The fundamental error in appellants' contention lies in their failure to recognize the clear distinction between "advance payments" and "partial payments" despite the fact that the Armed Services Procurement Regulations specifically distinguish between such payments.[6] Partial payments upon the purchase price do not fall within statutory prohibitions relative to advance payments which are in the nature of a loan. The practice of using partial payment clauses in procurement contracts has been followed since the early 1800's to the present day. The validity of such partial payment clauses, with title vesting in the Government has been recognized and affirmatively approved by the courts, the Attorney General, the Comptroller General and the Armed Services. *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); In re *Read York*, 152 F (2d) 313,316 (1945); 20 *Opinions of Atty. Gen.* (U.S.) 746, 747 (1894); 29 *Opinions of Atty. Gen.* 46, 48; *Comptroller Gen. Decision* No. B-83260, 4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949); *Opinion of Judge Advocate Gen.*, SPJGC, (1945) 10118, 4 Contract Cases Fed. (C.C.H.) Sec. 60,016.

Absolute Title to the Property in Question was Vested in the United States.

It has long been recognized that where Federal procurement contracts so provide, title to material on hand and goods in process, in the possession of a contractor, vests in the United States upon receipt by the contractor of a partial payment upon the purchase price. Such title in the United States is absolute and complete—not bare legal title for security purposes—and the property thus acquired is immune from state and local ad valorem taxes, *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); *In re Read York*, 152 F (2d) 313,316 (1945); *Douglas Aircraft Co. v.*

[6] See Appendix hereto.

Byran County, 57 Cal. App. (2d) 311 (1943); *Craig, State Tax Collector v. Ingalls Ship Building Corp.*, 192 Miss. 254 (1942); *Superior Shipbuilding Co. v. Beekley*, 175 Wis. 337 (1921); *Wright Aeronautical Corp. v. Glander*, 151 Ohio 29 (1949).

Appellants' contention that Murray followed a course of conduct, in dealing with the assessed property, inconsistent with the claim that absolute title vested in the United States is without foundation. Virtually every argument advanced by appellants in an attempt to support such contention was rejected by this Court in *United States v. Allegheny County*, 322 U.S. 174 (1944) and *United States v. Ansonia Brass and Copper Co.*, 218 U.S. 452 (1910).

The District Court and the Court of Appeals thoroughly considered all of the undisputed facts and the inferences to be drawn therefrom and rejected appellants' contention as being contrary to law and the express provisions of the subcontracts in question. Accordingly, appellants' contention (Jurisdictional Statement, pages 5-6, and 13) that Murray engaged in a cause of conduct inconsistent with the vesting of absolute title in the United States does not present a substantial question for review by this Court. *Kennedy v. Silas Mason Co.*, 334 U.S. 249,256 (1948).

Property Owned by the United States is not Subject to State and Local Ad Valorem Property Taxes by Virtue of the Fact that it is in Possession of a Private Contractor.

Appellants' argument that the "incidence" of the tax is upon Murray because they assessed the property and sent the tax bill to Murray is without validity. The "incidence" of the ad valorem personal property tax here involved is upon the property and not upon the person to whom the tax bill is sent. (See Court of Appeals opinion, 234 F (2d) 380 at 383; and *City of Detroit v. Gray*, 314 Mich. 516, 521, and *Pingree v. Auditor General*, 120 Mich. 95, 102, 109). This Court, in un-

equivocal language, held in *United States v. Allegheny County*, 322 U.S. 174, 187-188 (1944) that Government owned property is immune from state and local ad valorem taxes either as against the Government or the person in possession of such property. This principle was further reaffirmed in *Esso Standard Oil Co. v. Evans*, 345 U.S. 495,499 (1953), and recognized in *Kern-Limerick Inc. v. Scurlock, Commr. Rev. of Arkansas* 347 U.S. 110, 123. Appellants' mere dissatisfaction with and refusal to accept the decision of this Court in the *Allegheny* case does not thereby create a substantial question for review on appeal.

A reading of the opinion of the Court of Appeals will clearly negative the assertion that important issues were left unanswered by that Court.

The mere fact that the application of the doctrine of Federal Constitutional immunity of Federally owned property is national in its scope and importance because of the long and extensive use of partial payment-title vesting clauses in defense procurement contracts of the United States does not of itself furnish the basis for further review of principles long established by this Court and repeatedly and most recently reaffirmed.

Furthermore, the argument of appellants that the doctrine creates hardships and inequities hardly affords a basis for such review. "The equities in this important conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization" and as this Court suggested in *Allegheny* at pages 190-191, if any remedy is warranted, the "remedy lies in petition to the Federal Congress, which also is their Congress." See *Kern-Limerick v. Scurlock*, 347 U.S. 110, at 116-7.

CONCLUSION

We submit, therefore, that since the Court of Appeals did not declare any State or local statute invalid as being repug-

nant to the Constitution, laws or treaties of the United States, the Court is without jurisdiction to entertain the appeal. Furthermore, the decision below is clearly correct, the questions involved do not call for further review by this Court and no substantial question is presented. It is therefore respectfully submitted that the appeal be dismissed or that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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September 24, 1956

Appendix

Armed Services Procurement Regulation

Excerpt re advance vs. partial payment

"Nature of advance payments. Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. **Advance payments are to be distinguished from 'partial payments' and 'progress payments' and other payments made because of performance or part performance of a contract."**

32 Code of Fed. Reg., 1949 ed., 1950 Pocket Supp., Chap. IV., Sub-part E, Sec. 402-501.